STATE OF MICHIGAN
IN THE SUPREME COURT

TOWNSHIP OF FRASER,
Plaintiff/Appellant,

v.

HARVEY HANEY and
RUTH ANN HANEY,
Defendants/Appellees
_____/

Supreme Court Case No.: 160991
Court of Appeals Case No.: 337842
Circuit Court Case No.: 16-3272-CH

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HANEY APPELLEES' BRIEF

*** CALENDAR CASE – ORAL ARGUMENT PREVIOUSLY GRANTED ***

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

COUNTER STATEMENT OF JURISDICTION

This is an appeal from a decision by the Michigan Court of Appeals, issued on January 21, 2020 published as *Twp of Fraser v Haney (Fraser II)*, 331 Mich App 96; 951 NW2d 97 (2020). The Court of Appeals reaffirmed its prior reversal the Bay County Circuit Court's order denying summary disposition as sought by the Haney-Defendants grounded on statute-of-limitations. This Court has jurisdiction pursuant to MCL 600.212, MCL 600.215(3), and MCR 7.303(B)(1) to review by appeal a case after a decision by the Court of Appeals. Leave to appeal was granted on November 25, 2020. *Twp of Fraser v Haney*, __ Mich __; 950 NW2d 748 (2020). Pursuant to MCR 7.312(D), a copy of all the lower courts' decisions are included in the Appendix.

STATEMENT OF QUESTION PRESENTED BY ORDER OF THIS COURT

I. Whether MCL 600.5813 applies to municipalities seeking to enjoin zoning ordinance violations?

Haney Appellees say: Yes
Township Appellant says: No

INTRODUCTION

The Legislature has decreed that "all other personal actions shall be commenced within the period of 6 years after the claims accrue *and not afterwards* unless a different period is stated in the statutes." MCL 600.5813. Fraser Township commenced a lawsuit against two people—Ruth Haney and Harvey Haney (mother and son)—to enjoin the continued existence of their piggery alleged to be in violation of this rural township's zoning ordinance. Because MCL 600.5813 applies and the lawsuit was brought four years too late, the Court of Appeals' *Fraser I* and *Fraser II* decisions should be affirmed.

FACTS

The facts are simple. The Haneys have operated an American mulefoot[1] piggery since 2006. **Appendix #35b, ¶5.** In 2016, Fraser Township filed an abatement lawsuit alleged this existence of the piggery—in and of itself—has continuously constituted a zoning violation for existing in an alleged prohibited zoning district (C-3) since its inception in rural Bay County, Michigan. **Appendix #19b-21b**. A zoning violation may be challenged as a nuisance per se and remedied by abatement—a type of equitable relief. MCL 125.3407. The Township sued the Haneys, not their property. **Appendix #19b**. After securing replacement counsel, the Haneys cross-moved for summary disposition on Fraser Township's *in-personam* action on the grounds their farm has been in existence and operating as a piggery, consistently, since 2006—in excess of the applicable statute-of-limitations of six years, MCL 600.5813. The issue presented to the trial court was clear:

[1] The Mulefoot is an American hog breed that is named for its most distinctive feature, the solid, non-cloven hoof which looks like the hoof of a mule. The Mulefoot breed is consistent in appearance and behavior, with qualities that have made it valuable in American history. See https://livestockconservancy.org/index.php/heritage/internal/mulefoot

does the statute-of-limitations apply against the local government? The Township's singular argument was one-dimensional—if there had been a statute-of-limitations option available in other precedential cases, the appellate courts would have used that affirmative defense rather than reaching the specific merits on zoning abatement questions. **Appendix #39b.**

At oral argument on the motion, Haneys' counsel expressly asked the Circuit Court to apply the statute-of-limitations under MCL 600.5813 as this case was not an *in-rem* lawsuit. **Appendix #57b**. In response, the Township's attorney agreed that an *in-rem* legal process to enforce a zoning violation "would be unheard of." ***Id.*** The Township expressly conceded "[y]ou just can't sue to try to enforce a zoning ordinance by suing a legal description." **Appendix #58b**. The Bay County Circuit Court rejected the joint assertions of both counsel and instead found local governments' abatement lawsuits for zoning enforcement are fully exempt from any statute-of-limitations as an *in-rem* styled action. **Appendix #87b.**

Believing this conclusion to be in error, the Haneys immediately filed for interlocutory leave to appeal to the Court of Appeals, which was granted. *Twp of Fraser v Haney*, unpublished order of the Court of Appeals, Docket No. 337842 (Sept 18, 2017). In its original opinion, which was later ordered published, the *Fraser I* Court of Appeals panel reversed the Bay County Circuit Court's *sua sponte* determination that public nuisance zoning abatement actions are undertaken *in-rem*, and instead applied MCL 600.5813 as advocated in the trial court by the Haneys. *Twp of Fraser v Haney (Fraser I)*, 327 Mich App 1; 932 NW2d 239 (2018). In doing so, the statute-of-limitations at MCL 600.5813 bars the Township's untimely suit, regardless if substantively meritorious or not.

The Township sought leave to appeal in this Court and it was remanded back to the Court of Appeals to address whether the published opinion in *Fraser I* was consistent with the published opinion in *Baker v Marshall*, 323 Mich App 590; 919 NW 2d 407 (2018) and, by extension, the application of MCR 2.118(C). *Twp of Fraser v Haney,* 504 Mich 968; 933 NW2d 42 (2019). On remand, the Court of Appeals reaffirmed *Fraser I* via a published decision. *Twp of Fraser v Haney (Fraser II)*, 331 Mich App 96; 951 NW2d 97 (2020).

Again, the Township appealed to this Court and, in a surprise move, leave was granted on the question seemingly rejected from the prior application made on the first appeal. *Twp of Fraser v Haney*, __ Mich __; 950 NW2d 748 (2020).

STANDARD OF REVIEW

Interpretation and application of a statute is a question of law reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

COUNTER ARGUMENTS

The arguments of the Township in its merits brief are similar to the ones made in its *Application*. They are unpreserved, generally underdeveloped, and essentially unfit for this Court's substantive review. It is clear the Township will be relying on the briefing of forthcoming amicus to carry this case. That is wholly improper. Because this case is badly postured, poorly briefed, and seeks to make amicus carry the weight of the Township's arguments, the Court of Appeals' well-reasoned decision in *Fraser I* and *Fraser II* should be simply affirmed.

I. The Township's filing contains numerous briefing failures making a proper response difficult, if not impossible.

A. Appellant's brief failed to follow the basic requirements of this Court.

On appeal to this Court, "[b]riefs in calendar cases must be prepared in conformity with MCR 7.212(B), (C), (D), and (G) as to form and length." MCR 7.312(A). Brief must contain "[a] statement of facts that must be a clear, concise, and chronological narrative" containing "material facts, both favorable and unfavorable, must be fairly stated without argument or bias." MCR 7.212(C)(6). It must contain "specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." *Id*. In addition, briefs in a calendar case "must be filed" with an "appendix that conforms with the requirements, form, and content of MCR 7.212(J)." MCR 7.312(D). The "appendix must also include a copy of the Court of Appeals opinion [] being appealed but need not include the briefs submitted in the Court of Appeals unless they pertain to a contested preservation issue." *Id.*

The Township's brief filed on January 12, 2021 fails in all these requirements. The statement of facts fails to have any reference to the trial court record. It also fails to alternatively point to the relevant portions of the required appendix because no appendix was created by Appellant for filing with this Court.

B. Amicus cannot step in the shoes of a party-appellant to carry a case.

Given the inadequate way Appellant's four-and-half page brief is presented (including not having an appendix) contrary to the Court Rules, it is expected the Township will be deferring to and relying on the arguments to be made by soon-to-appear amicus. This is wholly improper. There is no such thing as litigating amicus. *US v Michigan*, 940 F2d 143, 164 fn13 (CA 6, 1991). While courts should value input from

amici, "deciding a case by adopting an argument that neither party has made or responded to and none of the lower courts has addressed is quite a departure from the principle of party presentation." *Bisio v Village of Clarkston*, __ Mich __, __; 2020 Mich. LEXIS 1237 (2020) (Viviano, J, dissenting). Parties represented by competent counsel "know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *US v Sineneng-Smith*, 140 S Ct 1575, 1579 (2020); see also *Michigan Gun Owners, Inc v Ann Arbor Pub Sch*, 502 Mich 695, 709-710; 918 NW2d 756 (2018).

Moreover, passing the appellate oar to amicus to propel this appellate ship is unfair to Appellees. The litigating Appellees will not have the benefit to respond to the arguments of the improper "de facto" litigating counsel because "litigating amicus" will not file until at or after Appellees file their brief. Such gamesmanship is improper, unfair, and contrary to the court rules and appellate customs.

C. All but one argument made by Appellant was not raised in the trial court and are waived.

A litigant must generally preserve an issue for appellate review by "raising" it in the trial court. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). This Court has explained that appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them. *Id.* at 388. The correct posture is in the trial court. *Id.* This required practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. *Id.*[2]

[2] However, preservation requirements may be overlooked "where failure to consider the issue would result in manifest injustice, if consideration of the issue is necessary to a proper determination of the

Also closely related in preservation jurisprudence is the requirement of asserting a consistent position as taken before the trial court. Counsel may not harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). A party "may not assign as error on appeal something that [it] deemed proper in the lower court because allowing [it] to do so would permit [it] to harbor error as an appellate parachute." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011).

II. The statute-of-limitations bars the Township's suit.

A statute-of-limitations bars a claimant from filing suit after the statutory period has expired. *Lothian v Detroit*, 414 Mich 160, 167; 324 NW2d 9 (1982). It is a procedural device intended to promote judicial economy and protect the rights of defendants by precluding litigation of stale claims, *Attorney General v Harkins*, 257 Mich App 564, 569; 669 NW2d 296 (2003), and, as described by this Court, is a "perfectly righteous" meritorious affirmative defense, *Bigelow v Walraven*, 392 Mich 566, 570; 221 NW2d 328 (1974). A statutory limitations period represents a legislative determination of that reasonable period of time that a claimant—including a government—will be given in which to file an action. *Lothian*, 414 Mich at 165.

> Limitations periods created by statute are grounded in a number of worthy policy considerations. They encourage the prompt recovery of damages; they penalize plaintiffs who have not been industrious in pursuing their claims; they afford security against stale demands when the circumstances would be unfavorable to a just examination and decision; they relieve defendants of the prolonged fear of litigation; they prevent fraudulent claims from being asserted; and they remedy… the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert.

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case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Appellant has not made any argument to suggest it fits within one of these exemptions.

Id. at 166-167. In other words, Michigan law requires a party not to sit idly by but rather timely assert proper claims within the period after any claims first accrue to prevent detriment to any defendants. The statutes-of-limitations apply regardless whether equitable or legal relief is sought. MCL 600.5815. The claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results. MCL 600.5827.

Courts must apply statutes-of-limitations as duly enacted. "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). The Legislature has clearly decreed that "[a]ll other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." MCL 600.5813. A government-plaintiff gets no special treatment unless so provided by the Legislature via another statute.

This case involving the applicable statute-of-limitations is simple. The Township sued two people via an *in-personam* lawsuit. It sought to enjoin an alleged zoning violation pursuant to authority granted by the Legislature. MCL 125.3407. Certain types of *in-personam* actions must be brought in specific timeframes. E.g. MCL 600.5801 – MCL 600.5811. "All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." MCL 600.5813. Because the Township never identified any other relevant statute, the applicable statute-of-limitations is MCL 600.5813. *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346, 383; 760 NW2d 856 (2008); *Harkins,* 257 Mich App at 569.

In the final tally, the Township simply brought its legal action against the continuing existence of the Haney piggery as a zoning violation too late. There is nothing remarkable about this application of this black letter law. It happens when litigants sue too late based upon the plain language application of the applicable statute-of-limitations, even if it seems to this government as unfair. E.g. *Henry v Dow Chemical Co*, 501 Mich 965; 905 NW2d 601 (2018); see generally *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007). The statutes-of-limitations have been regularly applied and are quite familiar to governments in both the criminal contexts, e.g. MCL 767.24, and also the civil contexts, e.g. *City of Fraser v Almeda Univ*, 314 Mich App 79, 100-101; 886 NW2d 730 (2016); *Detroit Bd of Edu v Celotex Corp*, 196 Mich App 694; 493 NW2d 513 (1992); *City of Midland v Helger Constr Co, Inc*, 157 Mich App 736; 403 NW2d 218 (1987); *City of Marysville v Pate, Hirn & Bogue, Inc*, 196 Mich App 32, 37; 492 NW2d 481 (1992) (as to contract claim); *City of Ann Arbor v AFSCME*, 284 Mich App 126; 771 NW2d 843 (2009). Township governments are not exempted from such legal coverage. Nor should they be absent legislative amendment. *Trentadue,* 479 Mich at 407 ("statutes lose their meaning if an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity.").

A. The Township's arguments fail to carry.

In this Court, the Township kicks off its merit-briefing by asserting townships have constitutional and statutory authority to adopt zoning ordinances to promote the health, safety, and welfare of a geographical area. That has never been in dispute. However, the Township then suggests it is not subject to any statute-of-limitations when enforcing the a zoning ordiance. It then flatly self-concludes, in one sentence, that a zoning abatement action is not a personal action and that this action is pled *in-rem*. That assertion is contrary

to the position it made in the trial court, **Appendix #58b**, and cannot be asserted now. *Carter*, 462 Mich at 214; *Hudson*, 294 Mich App at 264.

B. This case is not (and was not pled by the Township as) an *in-rem* lawsuit.

The Township cannot make an assertion in this Court that enforcement of zoning is enforceable as an *in-rem* action when having taken a contrary position in the trial court. **Appendix #58b-59b** (Township rejecting that a suit can proceed *in-rem* to enforce an alleged zoning violation). Allowing such a contrary position is in violation of the appellate parachute and preservation rules. *Carter*, 462 Mich at 214; *Hudson*, 294 Mich App at 264.

As the Court of Appeals correctly noted, "this is not an action against the subject property itself to determine its fate. Rather, it is an action seeking injunctive relief against specific, natural persons to force those persons—and only those persons—to come into compliance with a local zoning ordinance." *Fraser I,* 327 Mich App at 13. As such, this case was never pursued as an *in-rem* styled lawsuit by pleading against the property[3] or by raising the issue in the trial court.

The Court of Appeals also explained that it has previously outlined the distinction between actions *in-personam* and actions *in-rem*:

> [A]ctions in personam differ from actions in rem in that actions or proceedings in personam are directed against a specific person, and seek the recovery of a personal judgment, while actions or proceedings in rem are directed against the thing or property itself, the object of which is to subject it directly to the power of the state, to establish the status or condition thereof, or determine its disposition, and procure a judgment which shall be binding and conclusive against the world. The distinguishing characteristics of an action in rem is [sic] its local rather than transitory nature, and its power to adjudicate the rights of all persons in the thing.

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[3] The Township pled an *in-personam* action. **Appendix #19b**. A party is bound by its pleadings. *Joy Oil Co v Fruehauf Trailer Co*, 319 Mich 277, 280; 29 NW2d 691 (1947).

Detroit v 19675 Hasse, 258 Mich App 438, 448; 671 NW2d 150 (2003). Problematic for the Township, no Michigan court has ever held that a claim seeking the abatement of a public nuisance constitutes an action *in-rem*. Nor can one. When zoning enforcement is undertaken pursuant to MCL 125.3407 (the enforcement statute), the "owner or agent in charge of the dwelling, building, structure, tent, recreational vehicle, or land" and not the land itself "is liable for maintaining a nuisance per se." In other words, only an *in-personam* action is authorized by the statute. The Township's argument fails.

C. 'It would have been used' is not a valid argument.

The actual and only trial-level argument raised and argued by the Township against the Haneys' summary disposition motion on statute-of-limitations grounds was 'if there had been a statute-of-limitations problem' in other cases, the Court of Appeals would have used that in prior cases rather than reaching the merits on zoning abatement questions. **Appendix #38b**. The Court of Appeals easily and correctly rejected that argument. It explained "the fact that a[nother] court does not discuss a potentially relevant argument in a written opinion does not bear on the merit of the argument." *Fraser I,* 327 Mich App at 13. The statute-of-limitations was simply not raised before the trial court in other cases or that the issue was not pursued on appeal by others. In either situation, the statute-of-limitations defense—though it may have been meritorious or, at least, applicable—would not have been analyzed by appellate courts. *Id*. The *Fraser I* panel corrected recounts that a party cannot prevail based on the fact that an argument was not raised in another case, especially when it is unclear whether such an argument had any bearing on its outcome. *Id.* at 14. This makes perfect sense given our appellate rules of procedure.

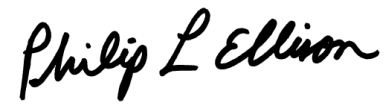
D. Policymaking belongs with the Legislature.

The only other argument offered by the Township is policy concerns with enforcing a statute-of-limitations requirement on township governments. The Township fails to recognize that these types of "perfectly righteous" statutes have long been imposed against governments in both the criminal and civil contexts. As a matter of public policy, perhaps a different statute-of-limitations ought to be applicable. But that decision lies with the Legislature, not this Court, to rewrite or amend the statute-of-limitations for public policy reasons. *Cady v Detroit*, 289 Mich 499, 509; 286 NW 805 (1939) ("Courts cannot substitute their opinions for that of the legislative body on questions of policy"). Arguments that a statute is "unwise or results in bad policy should be addressed to the Legislature." *People v Kirby*, 440 Mich 485, 493-494; 487 NW2d 404 (1992). Certain exceptions have already been made for other specific circumstances. E.g. MCL 600.5821. If another exception is a good policy idea, the Township should ask and can easily persuade the branch of government who writes the law, i.e. the Legislature, to make an addition to Section 5821 for township zoning enforcement. Until then, this Court cannot act as a super-legislature to self-create one.

RELIEF REQUESTED

Statutes-of-limitations apply to government abatement actions filed against owners who are alleged to have violated the zoning ordinance. MCL 125.3407. Violation of a zoning ordinance is an *in-personam* nuisance per se action that has a six-year statute-of-limitations pursuant to MCL 600.5813. The lawsuit brought in this case was four years too late. The Court of Appeals' decisions under *Fraser I* and *Fraser II* should be affirmed. If the Township desires a different standard, it should ask the Legislature for such relief.

RESPECTFULLY SUBMITTED:



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Date: January 27, 2021